THE HON'BLE SRI JUSTICE K.C.BHANU
AND
THE HON'BLE SMT JUSTICE ANIS

WRIT PETITION NOs.17046 OF 2002 AND 19206 OF 2010

COMMON ORDER: (per the HON'BLE SRI JUSTICE K.C.BHANU)

These two writ petitions under Article 226 of the Constitution of India are filed by Mr.N.Manoharan, who was working as Deputy Director of Sericulture, Madanapalle, challenging the orders of the Andhra Pradesh Administrative Tribunal, Hyderabad (for short 'the Tribunal') in O.A.No.1668 of 1999, dated 28-03-2002 and in O.A.No.3064 of 2007, dated 23-01-2009.

2. O.A.No.1668 of 1999 was filed by Mr.A.K.Nazeer Saheb and K.Swaminathan to direct the respondents therein to assign seniority in the cadre of Assistant Director of Sericulture in accordance with the proviso 'F' to Rule 2 as issued and contained in G.O.Ms.No.315, dated 26-04-1973 and for consequential direction to the respondents not to operate the final seniority list issued vide proceedings No.8534/ADS/96-B1, dated 20-08-1996 by declaring the same as void, whereas O.A.No.3064 of 2007 was filed by Smt.C.Aruna Kumari to direct the official respondents therein to fix her seniority and place her in appropriate place over and above the respondents 3 and 4 therein in the seniority list of Assistant Director of Sericulture in Zone IV and consider her case to the next higher category of Deputy Director of Sericulture w.e.f the date of promotion of the 4th respondent therein with all consequential benefits by placing her in appropriate place in the quota meant for direct recruitment in which she was appointed.

3. The Tribunal basing on the material on record, disposed of O.A.No.1668 of 1999 directing the official respondents to revise the seniority list of Assistant Directors of Sericulture published in proceedings No.8534/ADS/96-B1, dated 20-08-1996 keeping proviso 'F' to Rule 2 of G.O.Ms.No.315, dated 26-04-1973 and instructions of the Government in Circular Memo No.16/Ser.A/93-39, G.A.D., dated 21-04-1999 also in view and promote the applicants as Deputy Directors of Sericulture, if they are eligible in all respects as two posts must have been kept vacant in view of the interim order, dated 07-04-1999. The Tribunal disposed of O.A.No.3064 of 2007 directing the official respondents to recast the seniority of the direct recruits and promotees by following the judgment of the Hon'ble Supreme Court of

India reported in 2000 (7) SCC 561 and GAD Memo No.16/Ser.A/93-39, dated 21-04-1999 and also following the order, dated 08-07-2003. The said order is subject to the outcome of the final order that may be passed in W.P.No.17046 of 2002 pending before this Court. Hence, these writ petitions.

4. Petitioner herein was appointed as Assistant Inspector of Sericulture on 22-01-1979 and he was promoted as Inspector of Sericulture on 24-01-1982. On 25-06-1985, he was promoted as Assistant Director of Sericulture and his services were regularized and probation was declared. In the year 1985, 9 inspectors of Sericulture were promoted as Assistant Directors on 25-06-1985 and their services were regularized by declaring their probation on 25-06-1986. The name of the writ petitioner was shown in the final seniority list of Assistant Directors at Sl.No.18. On 08-12-1986 when the Department Promotion Committee (for short 'DPC') met for appointment of Assistant Directors, it was pointed out by the DPC to fill up certain posts of Assistant Directors of Sericulture by direct recruitment as per G.O.Ms.No.315, dated 26-04-1973. As per G.O.Ms.No.315, there shall be a direct recruitment where there are more than 5 permanent posts and out of every four permanent vacancies of Assistant Directors of Sericulture, the third vacancy shall be filled or reserved to be filled by direct recruitment. As 14 vacancies sought to be filled in the year 1987, the DPC desired that out of the proposed 14 posts, 3 posts are to be filled by direct recruitment through Andhra Pradesh Public Service Commission (for short 'APPSC'). Accordingly, on 08-12-1987, the Department of Sericulture notified three posts of Assistant Directors for direct recruitment to the APPSC. Accordingly, APPSC issued notification for filling up of 3 posts of Assistant Directors on 16-05-1988. All the three applicants in the O.As. were selected in the selection process. On 23-02-1989 the Government issued G.O.Ms.No.96 approving the selections of three directly recruited candidates. Prior to G.O. some of the Inspectors of Sericulture have filed Revision Petitions before the Tribunal challenging the selection made by APPSC on various grounds. On 27-03-1988, the Tribunal allowed R.P.Nos.6203 of 1988 and 6798 of 1988 by setting aside the selection made by the APPSC holding that there are no permanent vacancies and the substantive vacancies are different from permanent vacancies. One of the applicants, by name, A.K.Nazeer Saheb filed R.P.No.22819 of 1989 to appoint him as Assistant Director of Sericulture while challenging the earlier Revision Petitions before the Supreme Court. On 30-10-1989 the Tribunal directed the Government to appoint A.K.Nazeer Saheb and others as

Assistant Directors of Sericulture. Accordingly, on 05-05-1990, the Government issued a memo directing the department to appoint three applicants as Assistant Directors of Sericulture. All the applicants joined as such on 10-05-1990. In Civil Appeal No.87-88 of 1990, two direct recruits namely A.K.Nazeer Saheb and Swaminathan, filed Special Leave Petition before the Supreme Court and the Supreme Court gave interim directions appointing them as Assistant Directors. Ultimately the Civil Appeal was allowed on 19-02-1998 confirming their appointments holding that the substantive vacancies and permanent vacancies are one and the same. However, there is no mention about the seniority. On 20-08-1996, the Commissioner of Sericulture issued final seniority list of Assistant Directors, in which, the name of the writ petitioner was shown at Sl.No.18, whereas the names of three applicants (direct recruits) were shown at Sl.Nos.29,30 and 31 taking into consideration the dates of their appointment as Assistant Directors. A.K.Nazeer Saheb and Swaminathan filed O.A.No.1668 of 1998 to fix the seniority among direct recruits and promotees. In that O.A., an interim direction was given on 07-04-1999 to finalize the seniority list. In pursuance of that interim order, the Commissioner of Sericulture passed an order rejecting the request of A.K.Nazeer Saheb and Swaminathan for revision of seniority. Those proceedings have become final. Originally W.P.No.17046 of 2002 was allowed on 16-10-2003 setting aside the judgment in O.A.No.1668 of 1998 with an observation that since the order of Commissioner of Sericulture, dated 06-07-1999 in which the request for revision of seniority was rejected, was not impugned, which was passed during the pendency of O.A., the O.A. becomes infructuous. Challenging the same, W.P.No.17046 of 2002 was filed and the same was allowed. Aggrieved thereby, Civil Appeal No.7892 of 2004 was filed before the Supreme Court and the Hon'ble Supreme Court set aside the judgment of this Court in W.P.No.17046 of 2002, dated 16-10-2003 and remanded the matter to this Court for fresh disposal on merits and also liberty was given to the petitioners therein to apply for amendment of prayer in the writ petition with a view to challenge the order of Commissioner of Sericulture, dated 06-07-1999 and also to bring on record such of the promotees who may be adversely affected.

5. It is not in dispute before this Court that the petitioner was appointed as Assistant Director of Sericulture in the year 1985 along with some others, whereas the unofficial respondents in both the writ petitions were directly recruited as Assistant Directors of Sericulture on 09-05-1990. By that time, the writ petitioner has put up five years of service in the cadre of Assistant Director of Sericulture. The

grievance of the applicants/unofficial respondents is that their seniority shall be fixed over and above the writ petitioner (promotee) with reference to the vacancies earmarked for the direct recruits. As per the impugned proceedings issued by the Commissioner of Sericulture, dated
20-08-1996, it is clear that the writ petitioner was on probation as Assistant Director of Sericulture on 26-06-1985. His probation was declared on 25-06-1986 in terms of Rule 18 of A.P. State and Subordinate Services Rules, 1996. In the combined seniority list of Assistant Director of Sericulture in the cadre of Inspector of Sericulture, he was shown at Sl.No.18. In the final seniority list of Assistant Director of Sericulture, he was shown at Sl.No.18 with the date of regularization as 26-06-1985. Even the unofficial respondents did not deny or dispute that he is approved probationer in the cadre of Assistant Director of Sericulture from 26-06-1985. It is also not in dispute before this Court that the services of the unofficial respondents in the O.As were regularized w.e.f. 10-05-1990 i.e., from the date of their joining in the cadre of Assistant Director of Sericulture. Accordingly, their seniority was fixed at Sl.Nos.29, 30 and 31. It is not in dispute before this Court that the SLP filed by the direct recruits of Assistant Directors of Sericulture was disposed by the Supreme Court, vide judgment, dated 19-02-1988 in C.A.No.87-88 of 1990, wherein it was held thus:

> "The appellants are right in their submission that substantive vacancies are synonymous with the vacancies in permanent posts. The three appellants, being the directly recruited Assistant Directors Sericulture, have filled the substantive vacancies in the permanent cadre of the Assistant Directors Sericulture. In that view of the matter, 3 posts of Assistant Director of the Sericulture were clearly available to be filled by direct recruitment to which the appellants have been appointed. We, therefore, allow the appeals, set aside the impugned order of the Tribunal holding otherwise and would dismiss the petitions filed by the respondents 4 to 7 before the Andhra Pradesh Administrative Tribunal."

But, in the above judgment, there is no indication of fixation of seniority of the individuals appointed in these posts. May be reason that the department is not clear about the availability of permanent posts till 1987.

6. The point that arises for consideration in these two writ petitions is whether as to how the inter se seniority has to be fixed among the direct recruits and promotees?

7. Learned counsel for the writ petitioner contended that for determination of the seniority of the employees, Rule 33 of the Andhra

Pradesh State and Subordinate Services Rules, 1962 (for short 'the Rules') has to be applied and that in view of amendment of framing of adhoc Rule, inter se seniority shall be determined in accordance with general Rule 33 (a) and (b) of the Rules, that quota/rota Rule meant for the purpose of recruitment is as per cadre, but not to determine the inter se seniority and hence, he prays to set aside the impugned order. He placed reliance on the decisions, which will be referred to at appropriate time.

8. On the other hand, learned senior counsel appearing for the unofficial respondents contended that Rule 1 of rota is inbuilt in the quota prescribed for the direct recruits in terms of proviso F to Rule 2 of G.O.Ms.No.315, dated 26-04-1973, that the instructions of the Government, Circular Memo No. 16/Ser.A/93-39, G.A.D., dated 21-04-1999 has to be followed and precisely for that reason, the Tribunal directed to follow the aforesaid mentioned Rule and the Government Circular in fixing the seniority for promotees and direct recruits in the cadre of Assistant Director of Sericulture, that the delay in making the appointments by direct recruitment would not have come in the way of promotees of adverse consequence denying them in benefit of services and hence, he prays that the final seniority list, dated 20-08-1996 ought not to have set aside by the Tribunal.

9. Where statutory provisions (including rules) or administrative instructions provide for the factors to be taken into consideration and the manner to be adopted in fixation of seniority, then, subject to such provisions or instructions being constitutionally or otherwise valid, seniority has to be fixed in accordance with such provisions or instructions. As in other fields of service law, the first step in resolving a disputed question of seniority is to ascertain whether there are any statutory provisions operating in the field. If statutory provisions exist, then they will have primacy. Although, it is generally accepted principle to compute seniority on the basis of length of continuous service, if the rules make it irrelevant then the rules must be applied. On this aspect, it is pertinent to refer to a decision of the Supreme Court reported in **DIRECT RECRUIT CLASS II ENGINEERING OFFICERS' ASSOCIATION V STATE OF MAHARASHTRA** [1], wherein it was held thus:

> "There is no dispute that in the absence of any special provision regulating determination of seniority, length of continuous service in any particular grade would be the basis for determining seniority in that grade. The legal position is equally settled that if a rule prescribes a method of fixation of inter se seniority, the normal practice would not apply and the rule shall prevail, obviously subject to its constitutionality."

Therefore, the question of seniority has to be determined by the rules in force on the date of appointment to the service. It is well settled that when recruitment of service is to be made from two or more sources the statutory provisions or administrative instructions governing such recruitment may (in fact it should) fix a quota in respect of each of the sources according to which such recruitment is to take place. When a recruitment to a service is from two or more sources, the authorities can adopt the rotational system (in service parlance commonly referred to as 'Rota Rule") in fixing seniority. A roster should be maintained based on the reservation for direct recruitment and promotion in the recruitment rules.

10. It is not in dispute before this Court that three posts of Assistant Director of Sericulture were clearly available to be filled by direct recruitment in the year 1987. When the DPC met for appointment of Assistant Directors of Sericulture from the feeder category, it desired that out of proposed 14 posts of Assistant Director of Sericulture, 3 posts have to be filled by direct recruitment. According to the learned counsel for the unofficial respondents, in terms of G.O.Ms.No.315, dated 26-04-1973, an amendment was made to the special rules for the Andhra Pradesh Industrial Service. The following proviso namely 'f' is added to the said rule which reads as follows:

> "Appointment to the post of Assistant Sericulture Expert by direct recruitment shall be made only when there are more than 5 permanent posts. Out of every four permanent vacancies of Assistant Sericulture Expert, the third vacancy shall be filled or reserved to be filled by direct recruitment."

11. Basing on the above rule, it is vehemently contended by the learned counsel for the respondents that as on the date of giving promotion to the petitioner as Assistant Director of Sericulture in the year 1986, three substantive vacancies were available and in stead of keeping every three vacancies to be filled by the direct recruitment or reserved to be filled these posts meant for direct recruits were also filled up through the promotees and hence, the Tribunal rightly directed the Government to follow this rule (f), which was issued in G.O.Ms.No.315 and hence, prays to dismiss the writ petition. On this aspect, he relied on a decision reported in **M.SUBBA REDDY AND ANOTHER V A.P. STATE ROAD TRANSPORT CORPORATION AND OTHERS** [2], wherein it was held thus:

> "WE do not find any merit in the above arguments. Appellants have not challenged the validity of the above regulations. As stated above, it has been contended before us on behalf of the appellants that item-3(1) of Appendix-A (section-B) prescribes method of recruitment and

the manner in which vacancy is to be allocated, which does not involve rotation for the purposes of seniority; that item-3(1) of Appendix-A (section-B) prescribes only quota and rota cannot be implied. However, the appellants before the High Court unequivocally submitted that under the above regulations, promotions and direct recruitments were required to be made in the ratio of 1:1 and that the said regulations provided for a cycle in which vacancies were to be rotated. In the said affidavit, it is further submitted that in the absence of direct recruits, the slots reserved for direct recruits were liable to be adjusted with the promotees immediately and subsequently arrived direct recruits should be given their positions in the seniority list subsequently in a bunch. In our view, the averments of the appellants before the High Court, if accepted, would result in complete violation of the quota and rota rule embodied in the above regulations, which cannot be permitted. As stated above, appellants were promoted originally subject to the conditions envisaged in regulation 34 and, therefore, they cannot claim seniority by ignoring the said regulations and on the basis of their officiating services. They were promoted temporarily under regulation 30 which provides for ad hoc promotions. Regulation 34 ensures induction of qualified direct recruits. But for regulation 34, candidates from feeder posts would be temporarily promoted to the slots reserved for direct recruits and on their regularization, the quota prescribed for direct recruits will be defeated. Regulation 34 has been enacted to protect quota prescribed for direct recruits. As stated above, regulation 3 of the service regulations has to be read with regulations 30 and 34 of the said recruitment regulations. The appellants were promoted on temporary basis under regulation 30 with the clear understanding that the period of officiation will not give them any right over direct recruits in future. It is for this reason that regulation 30 (6) states that if a temporarily promotee is subsequently promoted in accordance with the regulations, his probation will commence in the higher category only from the date of subsequent promotions. For the same reason, regulation 34 states that revertees shall be subsequently considered for repromotion against the quota of vacancies reserved for being filled by promotion. Therefore, regulation 34 protects the quota prescribed for direct recruits. On reading regulation 3 of the service regulations with regulations 30 and 34 of the recruitment regulations, it becomes clear that neither the date of promotion nor the date of selection is the criteria for fixation of seniority. The fixation of seniority under the above regulations depends upon the number of vacancies falling in a particular category. Therefore, the rule of rota is inbuilt in the quota prescribed for direct recruits and for promotees in terms of item-3 of Appendix-A (section-B) to the recruitment regulations. In the present case, the above regulations prescribe a quota of 1:1, which leads to rota for confirmation. The fixation of seniority under the above regulations depends upon the number of vacancies against which promotees became due for promotion. In the case of Devendra Prasad Sharma v. State of Mizoram and Ors., rule 25(iii) stated that the relative seniority of direct recruits and of promotees shall be determined according to rotation of vacancies between direct recruits and promotees based on the quotas of vacancies reserved for direct recruitment and promotion. Rule 25(iii) is similar to item-3 (1) of Appendix-A (section-B). It was held by this Court that in cases where there is rotation of vacancies between direct recruits and promotees based on quota of vacancies, the rotation has to be considered in accordance with the vacancies as and when they accrue under the rules. Therefore, the quota rule needs to be strictly adhered to, if not, it would lead to absurdity. If the contention of the appellants is accepted, it would mean that the entire

group of direct recruits will have to be placed below the entire group of promotees. WE are of the opinion that having fixed the quota between the two sources of recruitment, there is no discretion with the corporation to alter the quota or to deviate from the quota. In the circumstances, there is no merit in the argument of the appellants that item-3(1) of Appendix-A (section-B) prescribes only quota and not rota and that the said item was not for determination of seniority. In the case of S.G. Jaisinghani v. Union of India and Ors., this Court held that having fixed the quota between two sources of recruitment, it is not open to the government to alter the quota or to deviate from the quota. In the case of Union of India and Ors. v. S.D. Gupta and Ors., the respondents were promotees - Extra Assistant Directors (Class-III) in Central Water Commission Engineering Class-I Service. The recruitment rules were made w.e.f. 15.10.1965. In the earlier litigation, the tribunal found that one Shri V.P. Misra, Extra Assistant Director was promoted on ad hoc basis on 31.3.1978 and he was required to be confirmed with effect from the date on which vacancy was available to him in the quota of promotees. The vacancy had admittedly arisen in the quota of promotees on 3.5.1979. Shri V.P. Misra was fitted in that vacancy. While doing so, the department applied principle of rota and quota and determined the inter-se seniority of promotees and direct recruits. Consequently, the promotees were pushed down in the order of seniority which led to second round of litigation. The question which arose for determination before this Court was whether fitment of seniority determined by the department was in accordance with the rules. The Court found that 60% of the vacancies were to be filled by direct recruits and 40% by promotees. Among the 40% quota, there was a further demarcation in the ratio of 25% and 15% between promotees and transferees. Admittedly, the promotees were entitled to their fitment within 25% quota. Vacancies for the promotees had arisen on 3.5.1979 and, therefore, V.P. Misra was entitled to that vacancy which arose on that date. However, as stated above, in the integrated list, the promotees were pushed down. It was contended on behalf of the promotees that the direct recruits were not born in the service when the promotees were promoted and equity requires that the promotees cannot be pushed down. This Court rejected the said argument by observing that the object of direct recruitment is to blend talent and experience. So long as the system continues, consequences were inevitable. Although, the direct recruits were recruited later, their fitment in the order of seniority had to be determined with reference to rota and quota prescribed under the rules. In such a case, there was no illegality even when promotees were pushed downwards in the order of seniority. In our view, the judgment of this Court in the case of S.D. Gupta's case (supra) squarely applies to the facts of the present case."

12. Placing reliance on the above judgment, it is contended that order of seniority has to be determined with reference to quota or rota prescribed under the rules. The contention of the learned counsel for the respondents can safely be accepted if there is no other rule, which prescribes the seniority among the direct recruits and promotees. In view of proviso (f) to Rule 2 of G.O.Ms.No.315, dated 26-04-1973, the rule of rota is inbuilt for the quota prescribed for direct recruits and promotees. If the case of the unofficial respondent is accepted, the principle of 'pushing down' is applicable. In such a case,

promotees who are occupying the vacancies within the quota of Direct Recruits will either be reverted or they will be absorbed in the vacancies within their quota. But, the learned counsel for the petitioner brought to the notice of this Court the adhoc rules clarifying the quota or rota rule if any prescribed either in the special rules or adhoc rules. The said adhoc rule was issued under proviso to Article 309 of the Constitution of India, Government of A.P. in G.O.Ms.No.607, General Administration (Services-A) department, dated
06-11-1992, which reads as follows:

> "Notwithstanding anything contained in the relevant Special Rules or the Adhoc Rules for the State and Subordinate Services, the quota/rota, if any prescribed in the said Special Rules/Adhoc Rules shall apply only for determining the number of vacancies earmarked for recruitment by promotion and appointment by transfer and for direct recruitment and not for determining their inter se seniority. The inter se seniority shall be determined in accordance with General Rule 33 (a) and (b) of the State and Subordinate Service Rules."

The above adhoc rule will have overriding effect of any other special or general rules. A reading of the above adhoc rule clearly provides that when a quota or rota is prescribed for direct recruits, it is meant only for the purpose of determining the number of vacancies earmarked for direct recruits and not for determining their inter se seniority. It also provides that General Rule 33 (a) and (b) of the Rules have to be followed in determining such seniority. As on the date of fixing of final seniority list on
20-08-1996, A.P. State and Subordinate Services Rules, 1962 (old Rules) were in force. As per Rule 33 (a) of the Rules, the seniority of a person in service, class, category or grade shall, unless he has been reduced to a lower rank as a punishment, be determined by the date of his first appointment to such service, class, category or grade. If any portion of the service of such person does not count towards probation under Rule 10 (a), (iv), 10 (c), 16, 37 (d) or 42 (d), his seniority shall be determined by the date of commencement of his service which counts towards probation. As per Rule 33 (b), the appointing authority may, at the time of passing an order appointing two or more persons simultaneously to a service, fix either for the purpose of satisfying the rule of reservation of appointments or for any other reason the order of preference among them; and where such order has been fixed, seniority shall be determined in accordance with it. From the above provisions, it is clear that the seniority shall be determined from the date of commencement of service.

13. It is contended by the learned counsel for the unofficial respondents (direct recruits) that there is no pleading with regard to

G.O.Ms.No.607, General Administration (Services-A), department, dated 06-11-1992 and hence it cannot be taken into consideration in the writ petition. The adhoc rule in G.O.Ms.No.607 is published in the Andhra Pradesh Gazette on 06-11-1992. There cannot be any dispute that a Rule made in exercise of the power under the proviso to Article 309 of Constitution constitutes 'law'. Question of law can be raised for the first time in the writ petition. Question of law need not be necessarily be raised before the Tribunal.

14. Learned counsel appearing for the petitioner placed reliance on the decision reported in **P.SUDHAKAR RAO AND OTHERS V U.GOVINDA RAO AND OTHERS** [3], wherein it was held thus:

> "However, the mere existence of a vacancy is not enough to enable an employee to claim seniority. The date of actual appointment in accordance with the required procedure becomes important in such a case. This was so held in State of Uttaranchal v. Dinesh Kumar Sharma, (2007) 1 SCC 683 [followed in Nani Sha v. State of Arunachal Pradesh, (2007) 15 SCC 406] where it was said:
> "Another issue that deserves consideration is whether the year in which the vacancy accrues can have any relevance for the purpose of determining the seniority irrespective of the fact when the persons are recruited. Here the respondent's contention is that since the vacancy arose in 1995-96 he should be given promotion and seniority from that year and not from 1999, when his actual appointment letter was issued by the appellant. This cannot be allowed as no retrospective effect can be given to the order of appointment order under the Rules nor is such contention reasonable to normal parlance. This was the view taken by this Court in Jagdish Ch. Patnaik v. State of Orissa [(1998) 4 SCC 456]."
> MORE recently, and finally, in Pawan Pratap Singh v. Reevan Singh, (2011) 3 SCC 267 all relevant precedents on the subject were considered, including the Constitution Bench decision in Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra, (1990) 2 SCC 715 and the legal position summarized (by Lodha, J.) as follows:
> "(i) The effective date of selection has to be understood in the context of the service rules under which the appointment is made. It may mean the date on which the process of selection starts with the issuance of advertisement or the factum of preparation of the select list, as the case may be. (ii) Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from different sources. Any departure there from in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution. (iii) Ordinarily, notional seniority may not be granted from the backdate and if it is done, it must be based on objective considerations and on a valid classification and must be traceable to the statutory rules. (iv) The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even been borne in the cadre and by doing so it may

adversely affect the employees who have been appointed validly in the meantime."

From the above decision, it is clear that inter se seniority in a particular service has to be determined as per the service rules. The date of entry into a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other.

15. He also relied on another decision reported in **M.SHYAM SUNDER AND OTHERS V GOVERNMENT OF A.P. AND OTHERS** [4], wherein it was held thus:

"When a person completes his period of probation satisfactorily as per the provisions of Rule 23 of the General Rules, he shall be deemed to have been regularized in the service from the day when he is appointed to a service though such employee might have completed period of probation at a later date. Further, Rule 23(a) enables the appointing authority to determine the date of commencement of probation either from the date of appointment or from such earlier date as the appointing authority may determine, in which event the person shall be deemed to have been regularized from such earlier and/or anterior date as decided by the appointing authority. When once a person is regularized in the service, that is to say, when the period of probation is satisfactorily completed, and deemed to have been completed from a date anterior to the date of appointment to a service, the date of commencement of probation which is either the actual date of appointment of service or such earlier date as is determined by the appointing authority can legitimately be the relevant date for the purpose of Rule 33(a) also which speaks of fixing of seniority. When once the appointing authority declares the date of regularization, it is final and the same cannot ordinarily be altered or changed. Even when the seniority list is reviewed under Rule 36 of the General Rules, to which a reference has already been made, the date of regularization cannot be changed or altered. But having regard to the rule position, where inter se seniority is fixed among direct recruits and promotees, the seniority position can be changed subject to maintaining inter se seniority placement in category, that is to say, either direct recruit category or promotee category. To say in other words, when a person belongs to promotee category, his date of regularization, and his place in the seniority list remain unchanged."

Basing on the above decision, it is contended that when the service of the petitioner was regularized by declaring the probation duly completed on 25-06-1985, his seniority i.e., date of regularization remained unchanged. Once the appointing authority declares the date of regularization of the service of the petitioner, it would be final and the same cannot be ordinarily altered or changed.

16. Learned Government Pleader for Services I appearing for the official respondents placed reliance on the decision reported in **A.N.PATHAK AND OTHERS V SECRETARY TO THE GOVERNMENT, MINISTRY**

OF DEFENCE AND ANOTHER [5], wherein it was held thus:

> "THE learned counsel for the respondents found it difficult to justify the validity of the rules and the lists in the light of the various decisions of this Court which have consistently leaned in favour of the promotees based on their length of service and seniority, in cases where there was inordinate delay in making direct recruitment. He tried to justify the inequity saying that the new rules have tried to rectify it. We are not satisfied with this explanation since that is little consolation to the petitioners. We are of the view that the grievance of the petitioners is justified in law. THE rules enabling the authorities to fill in vacancies for direct recruits as and when recruitment is made and thereby destroying the chances of promotion to those who are already in service cannot but be viewed with disfavour. If the authorities want to adhere to the rules strictly all that is necessary is to be prompt in making the direct recruitment. Delay in making appointments by direct recruitment should not visit the promotees; with adverse consequences, denying them the benefits of their service."

17. He further relied upon a decision reported in **PAWAN PRATAP SINGH AND OTHERS V REEVAN SINGH AND OTHERS** [6], wherein it was held thus:

> "From the above, the legal position with regard to determination of seniority in service can be summarized as follows:
>
> (i) The effective date of selection has to be understood in the context of the service rules under which the appointment is made. It may mean the date on which the process of selection starts with the issuance of advertisement or the factum of preparation of the select list, as the case may be. (ii) Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution. (iii) Ordinarily, notional seniority may not be granted from the backdate and if it is done, it must be based on objective considerations and on a valid classification and must be traceable to the statutory rules. (iv) The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even been borne in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the meantime."

18. He further relied upon a decision reported in **SURAJ PARKASH GUPTA AND OTHERS V STATE OF J & K AND OTHERS** [7], wherein it was held thus:

> "THIS contention, in our view, cannot be accepted. The reason as to why this argument is wrong is that in service jurisprudence, a direct recruit can claim seniority only from the date of his regular appointment. He cannot claim seniority from a date when he was not born in the service. THIS principle is well settled. In N. K. Chauhan v.

> State of Gujarat, (1977) 1 SCC 308 Krishna Iyer, J. stated :
> "later direct recruit cannot claim deemed dates of appointment for seniority with effect from the time when direct recruitment vacancy arose. Seniority will depend upon length of service."
> Again, in A. Janardhana v. Union of India, (1983) 2 SCR 936 : (AIR 1983 SC 769 : 1983 Lab IC 849) it was held that a later direct recruit cannot claim seniority from a date before his birth in the service or when he was in school or college. Similarly it was pointed out in A. N. Pathak v. Secretary to the Government, 1987 Suppl SCC 763 that slots cannot be kept reserved for the direct recruits for retrospective appointments."

From the above decisions, it is clear that a direct recruit can claim seniority only from the date of regular appointment. If the contention of the unofficial respondents is to be accepted that they may be placed above the petitioner in the seniority, it is nothing but accepting the claim of direct recruitment that it has to be anti-dated from the date of occurrence of vacancy. Direct recruits are claiming appointment from the date of vacancy as per quota or rota before their selection. In view of the above decision, the direct recruit cannot claim seniority from the date when they are not borne in the service.

19. The final seniority list was prepared in the cadre of Assistant Director of Sericulture on 06-07-1999 and the same was prepared in terms of General Rule 33 (a) of the Rules. Unless it is shown that the said final seniority list, dated 06-07-1999 is shown to have been passed arbitrarily or contrary to the rules applicable to the service conditions of the petitioner and the unofficial respondents, ordinarily the same cannot be interfered with. The Tribunal simply placed reliance on proviso (f) to Rule 2 of G.O.Ms.No.315, dated 26-04-1973 and instructions issued by the Government in Circular Memo No.16/Ser.A/93-39, G.A.D., dated
21-04-1999. It was also observed that if proviso (f) to Rule 2 of G.O.Ms.No.315, dated 26-04-1973 is to be implemented, the direct recruits (applicants in O.A.) have to occupy the 3rd, 7th and 11th position in the list of Assistant Directors of Sericulture.

20. It is also contended that even though the petitioner and some others were promoted, the probation should not have been commenced till the slot earmarked for direct recruit is taken in terms of Circular Memo No.16/Ser.A/93-39, G.A.D., dated
21-04-1999, which reads thus;

> 1) The seniority of a direct recruitee is to be determined only from the date of his /her joining duty, but not from the date on which the vacancy earmarked for direct recruitment arose.
>
> 2) If an employee is promoted to a post earmarked for direct recruitment, his probation shall not be commenced from the date of his

> joining into the slot earmarked for direct recruitment, but shall be reckoned only from the date on which he would have occupied the vacancy meant for promotee.

This memo is contrary to Rule 25 of the Rules, which reads thus:

> "At the end of the prescribed or extended period of probation, as the case may be, the appointing authority shall consider the probationer's suitability for full membership of the service, class or category for which he was selected."

Considering this Rule, the probation of the petitioner and some others were declared to have been completed satisfactorily. Further the Circular Memo, dated 21-04-1999 is contrary to the adhoc rule in G.O.Ms.No.607, dated 06-11-1992. Even though this adhoc rule has not been quoted in the impugned proceedings, but it is clear that while determining the seniority of direct recruits and promotees, General Rule 33 of the Rules has been followed. Therefore, when the final seniority list of the petitioner and some others has been fixed in accordance with the Rules, in the absence of any violation of the Rules in preparing final seniority list, the Tribunal ought not to have allowed the O.A. Further, though liberty was given to the petitioners therein by the Supreme Court to apply for amendment of prayer in the writ petition with a view to challenge the order, dated 06-07-1999, no such petition was filed. Therefore, the impugned orders are liable to be set aside and accordingly set aside confirming the final seniority list prepared by Director of Sericulture, A.P. Hyderabad in Rc.No.10850/88-B1, dated 06-07-1999.

21. Accordingly, the writ petitions are allowed. No order as to costs. Miscellaneous petitions, if any pending, in these writ petitions shall stand closed.

K.C.BHANU, J

ANIS, J

DATED: 10th DAY OF APRIL, 2014
Hsd

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[1] AIR 1990 SC 1607

[2] (2004) 6 SCC 729

[3] 2013) 8 SCC 693

[4] (2001) 6 ALD 87 (DB)

[5] 1987 (SUPP) SCC 763

[6] (2011) 3 SCC 267

[7] (2000) 7 SCC 561